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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

KENNETH L. MAYO
Petitioner,

vs.

STATE OF MISSOURI
Respondent.

MARY KRISTEN BECKER
Petitioner,

vs.

DIRECTOR OF REVENUE
Respondent.

On Petition for a Writ of Certiorari to the
Missouri Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether the Double Jeopardy Clause of the Fifth Amendment is violated when the State of Missouri prosecutes a person for driving while intoxicated after having suspended or revoked that person's driver's license for the same conduct in a separate administrative proceeding?

(2) Whether the Double Jeopardy Clause of the Fifth Amendment is violated when the State of Missouri suspends or revokes a person's driver's license in an administrative proceeding after having prosecuted that person for the same conduct in a separate criminal proceeding?

(3) Whether an administrative suspension or revocation of a driver's license based upon the driver's arrest for driving while intoxicated and a subsequently determined blood alcohol concentration of 0.10% or more constitutes "punishment" for double jeopardy purposes?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Kenneth L. Mayo and Mary Kristen Becker, pray that a Writ of Certiorari issue to review the judgment of the Missouri Supreme Court, which ruled that the protection against multiple punishment for the same offense as guaranteed by the Double Jeopardy Clause of the Fifth Amendment is not violated when the state prosecutes a person for the crime of driving while intoxicated in violation of Mo. Rev. Stat. § 577.010 (1994), and in addition, suspends or revokes that person's driving privileges for the same conduct in a separate proceeding pursuant to Mo. Rev. Stat. §§ 302.500–.541 (1994).

OPINION BELOW

The opinion of the Missouri Supreme Court was issued on February 20, 1996, and is reported at 915 S.W.2d 758 (Mo.banc 1996). A copy of the opinion is reprinted in Appendix A.

JURISDICTION

The decision of the Missouri Supreme Court in the consolidated cases of *State. v Kenneth L. Mayo*, and *Mary Kristen Becker v. Director of Revenue*, 915 S.W.2d 758 (Mo. banc 1996), was issued on February 20, 1996. This petition is being filed within 90 days of the issuance of the Missouri Supreme Court's opinion.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part that:

> [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . .

The Fourteenth Amendment to the United States Constitution provides in relevant part that:

> No state shall . . . deprive any person of life, liberty or property without due process of law, ...

This case involves Mo. Rev. Stat. §§ 302.500–.541 (1994), Suspension and Revocation, Administrative Procedure, and Mo. Rev. Stat. § 577.010 (1994), Driving While Intoxicated. The text of said statutes is set out in Appendix B and C, respectively.

STATEMENT OF THE CASE

These consolidated cases arose out of similar circumstances in which the State of Missouri sought to suspend or revoke petitioners' driver's licenses based upon their arrests for driving while intoxicated and a subsequently determined blood alcohol content of 0.10% or more, pursuant to Mo. Rev. Stat. § 302.505, and in addition, prosecute them for driving while intoxicated in violation of Mo. Rev. Stat. § 577.010 in a separate proceeding.

Mo. Rev. Stat. § 302.505 provides for the suspension or revocation of the driver's license of a person who is arrested upon probable cause to believe he or she was driving while intoxicated and who thereafter takes a chemical test which reveals that he or she has a blood alcohol concentration of 0.10% or more. If the person's driving record shows no prior alcohol related contacts during the preceding five years, the period of suspension is 30 days, followed by a 60–day period of restricted driving. The period of revocation is one year if the person's driving record shows one or more prior alcohol related contacts during the preceding five years. Mo. Rev. Stat. § 302.525.2. The suspension or revocation is effective 15 days after the driver receives notice thereof unless an administrative hearing is requested within that period. Mo. Rev. Stat. § 302.530.1. If an administrative hearing is requested, it is to be conducted by examiners licensed to practice law in Missouri who are em-

ployed by the Department of Revenue. The issues to be determined at the hearing are whether a preponderance of the evidence establishes that the person was arrested upon probable cause to believe that he or she was driving while intoxicated, and was subsequently determined to have an alcohol concentration of 0.10% or more by weight of alcohol in his or her blood. Mo. Rev. Stat. § 302.530.4. Any person aggrieved by the decision of the examiner may file a petition for trial de novo in the circuit court of the county where the arrest occurred. The burden of proof shall be on the State to adduce evidence at the hearing to justify the basis for the suspension or revocation. Mo. Rev. Stat. § 302.535. The disposition of any criminal charges arising out of the same occurrence is independent of, and does not affect, any suspension or revocation under the statutory scheme. Mo. Rev. Stat. § 302.505.3.

On September 16, 1994, petitioner Kenneth L. Mayo was charged with the crime of driving while intoxicated in violation of Mo. Rev. Stat. § 577.010. The Director of Revenue, in a separate administrative action under Mo. Rev. Stat. §§ 302.500–.541, revoked Mr. Mayo's drivers license for one year effective December 4, 1994. On March 3, 1995, Mr. Mayo filed a motion to dismiss the criminal proceeding. As grounds for the motion, Mr. Mayo contended that, in view of the prior license revocation, the criminal proceeding violated the Double Jeopardy Clause's prohibition against multiple punishment for the same offense. The trial court sustained Mr. Mayo's motion and dismissed the action. The State filed a timely appeal to the Missouri Court of Appeals, Western District.

Petitioner Mary Kristen Becker was charged with driving while intoxicated in violation of Mo. Rev. Stat. § 577.010. On September 7, 1994, she entered a plea of guilty as charged and was placed on probation for a period of two years. In a separate action, the Director of Revenue suspended Ms. Becker's driving privileges pursuant to Mo. Rev. Stat. § 302.500–.541. Ms.

Becker then filed a petition for trial de novo in the Circuit Court of Franklin County to contest the suspension. At her de novo hearing, Ms. Becker filed a motion asserting that the suspension violated the Double Jeopardy Clause of the United States Constitution, in that the State was seeking to punish her twice for the same conduct. She requested that the Court set aside the suspension. The trial court sustained the motion, and the Director appealed to the Missouri Court of Appeals, Eastern District.

The Missouri Supreme Court granted transfer in both cases prior to any decisions being rendered by the respective Courts of Appeal. Thereafter, on February 20, 1996, the Missouri Supreme Court issued its opinion reversing the decision of the trial court in both cases. The basis of the Missouri Supreme Court's decision was its conclusion that neither Mr. Mayo nor Ms. Becker were subjected to multiple punishment for the same offense because an administrative suspension or revocation imposed pursuant to Mo. Rev. Stat. § 302.505 does not constitute "punishment" for double jeopardy purposes.

REASONS FOR GRANTING THE WRIT

I. THE TEST APPLIED BY THE MISSOURI SUPREME COURT — THAT A CIVIL SANCTION THAT IS LARGELY REMEDIAL DOES NOT CONSTITUTE PUNISHMENT EVEN THOUGH IT SERVES IN PART TO PUNISH – CONFLICTS WITH THE DECISIONS OF THIS COURT IN *UNITED STATES V. HALPER*, 490 U.S. 435 (1989) and *AUSTIN V. UNITED STATES*, 509 U.S. ___, 113 S.Ct. 2801 (1993), WHICH PROVIDE THAT A CIVIL SANCTION THAT IS NOT SOLEY REMEDIAL BUT CAN ONLY BE EXPLAINED IN PART AS INTENDED TO PUNISH CONSTITUTES PUNISHMENT.

The determining issue before the Missouri Supreme Court in *State v. Mayo*, 915 S.W.2d 758 (Mo.banc 1996), was whether an administrative suspension and revocation imposed pursuant to Mo. Rev. Stat. § 302.505 constitutes "punishment" within the ambit of the Double Jeopardy Clause of the Fifth Amendment.[1] If such a suspension or revocation constitutes "punishment", the Double Jeopardy Clause is violated when the State seeks to impose the suspension or revocation as well as a criminal penalty for the same offense in a separate proceeding. *United States v. Halper*, 490 U.S. 435, 446–49 (1989). In finding that such a sanction did not amount to "punishment" for double jeopardy purposes, the Missouri Supreme Court disregarded the test set out in *United States v. Halper*, *supra*, and *Austin v. United States*, 509 U.S. ___, 113 S.Ct. 2801 (1993) for determining when a civil sanction constitutes "punishment", and fashioned its own test from selective language contained in *Halper* to rule against the petitioners. Accordingly, this Court should grant

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[1] The fifth amendment to the United States Constitution is applicable to the states through the fourteenth amendment. *Benton v. Maryland*, 395 U.S. 784 (1969).

certiorari to review the decision of the Missouri Supreme Court in *Mayo*.

This Court initially faced the questions of whether and under what circumstances a civil sanction can constitute "punishment" for double jeopardy purposes in *Halper*. Halper was prosecuted and convicted on 65 counts of violating the criminal false–claims statute for overbilling the government for Medicare services. Total overcharges paid to Halper amounted to the sum of $585.00. Thereafter,the government sued Halper under the civil False Claims Act based on the same facts that gave rise to his criminal convictions. Specific provisions of the Act provided for a civil penalty up to $2,000 per violation. In Halper's case, this amounted to a penalty in excess of $130,000.00. Halper's case reached this Court after the district court granted summary judgment for the government in the civil case but refused to impose the $130,000.00 statutory penalty on the ground that it would constitute a second "punishment" for double jeopardy purposes.

As a threshold matter, this Court pointed out that the labels affixed to the relevant proceedings – whether they are criminal, civil or administrative – are not controlling in determining whether a sanction constitutes punishment. The Court then set out the test for determining whether a civil sanction constitutes punishment for double jeopardy purposes.

> [T]he determination whether a given sanction constitutes punishment . . . requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve. . . . [A] civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment.
>
> These goals are familiar. We have recognized . . . that punishment serves the twin aims of retribution and deterrence. . . . From these premises, it follows that a civil sanction that cannot fairly be said solely to serve a remedial

> purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.

United States v. Halper, 490 U.S. at 448. Applying said analysis to Halper's case, this Court agreed with the district court that the imposition of the full civil penalty of $130,000.00 authorized by the False Claims Act constitutes punishment because of the "tremendous disparity" between that amount and the actual damages Halper caused the government. *Halper*, 490 U.S. at 452. This Court reasoned that, while the government was entitled to remedial justice, the sanction authorized by the Act did not solely serve a remedial purpose as applied to Halper's individual situation. *Id.* at 446, 452.

The reasoning applied by the Missouri Supreme Court to find that an administrative suspension or revocation under Mo. Rev. Stat. § 302.505 does not constitutes punishment conflicts with this Court's decision in *Halper*. The Missouri Court opined that *Halper* sets forth conflicting analyses for determining when a civil sanction constitutes punishment. *State v. Mayo*, 915 S.W.2d at 760, App. A at A-4. In addition to the "solely remedial" analysis (i.e., the principle that a civil sanction that is not solely remedial but can only be explained in part as intended to punish and deter, constitutes punishment), the Missouri Supreme Court believed *Halper* set out a second test; that a civil sanction that is largely remedial does not constitute punishment despite the fact that it serves in part to punish and deter. *Id.* at 760–61. The Missouri Supreme Court lifted this "largely remedial" analysis from this Court's specific holding in *Halper*:

> We therefore hold that a defendant who has already been punished in a criminal proceeding may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.

State v. Mayo, 915 S.W.2d at 762, App. A at A-4 (quoting *United States v. Halper*, 490 U.S. at 448–449).

Contrary to the conclusion of the Missouri Supreme Court, *Halper* does *not* set forth conflicting analyses for determining when a civil sanction constitutes punishment. The above–quoted language setting out the specific holding in *Halper* is contained in the same paragraph as, and immediately follows, this Court's pronouncement that "a civil sanction that cannot be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment." *Id.* These statements can, and should, be read as being consistent with one another – not as conflicting analyses between which a court must choose.

The Missouri Supreme Court is perhaps confused by this Court's statement in *Halper* that it was announcing a "rule for the rare case." *Halper*, 490 U.S. at 449. Based on this language, the Missouri Supreme Court believed that the "solely remedial" analysis could not be the correct test because "if the second sanction must be "solely remedial", then cases such as *Halper* would be the rule and not the exception." *State v. Mayo*, 915 S.W.2d at 762, App. A at A-7.

The Missouri Supreme Court's reasoning is flawed in that it fails to recognize that *Halper* was dealing with the application of a fixed penalty provision designed to do no more than make the government whole. *Halper*, 490 U.S. at 449. A civil sanction imposed under such a statute normally does not constitute punishment except in the *rare* case, such as *Halper*, where "a fixed penalty–provision subjects a prolific but small gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused." *Id.* at 449. The rule "for the rare case" language applies to Halper's particular situtation only, and does not change the general rule set out in *Halper*.

Halper stands for the general proposition that the "solely remedial" analysis is the proper test to apply in determining whether a civil sanction constitutes punishment for double jeopardy purposes. Any doubts to the contrary are dispelled by this Court's decision in *Austin v. United States*, 509 U.S.___, 113 S.Ct. 2801 (1993), where this Court reaffirmed and applied the "solely remedial" test in the context of determining whether a statutory *in rem* forfeiture scheme constitutes punishment.

Austin was convicted in state court in South Dakota of possessing cocaine with intent to distribute. Thereafter, the United States filed an *in rem* forfeiture proceeding against his mobile home and auto body shop. The government's theory was that these facilities were used to facilitate the commission of the drug offense for which Austin had been convicted in state court. Austin contended that the forfeiture of his properties would violate the Eighth Amendment's prohibition against excessive fines.

The issue before the Court was whether the statutory forfeiture constituted "punishment". Unlike this Court's decision in *Halper*, which focused on whether the sanction as applied to Halper individually served the goals of punishment, the *Austin* decision focused on the statutory scheme as a whole. *Id.* at 2812 n.14. In determining whether the statutory scheme constituted punishment, this Court specifically noted that sanctions frequently serve more than one purpose and that a sanction that serves in part to punish constitutes punishment regardless of whether it also has a remedial purpose.

> In considering this question, we are mindful of the fact that sanctions frequently serve more than one purpose. We need not exclude the possibility that a forfeiture serves remedial purposes to conclude that it is subject to the limitations of the Excessive Fines Clause. We, however, must determine that it can only be explained as serving in part to punish. We said in *Halper* that "a civil sanction that cannot fairly be said

> solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." (citation omitted)

Austin v. United States, 113 S.Ct. at 2806. *See also Id.* at 2810 n.12. Applying these principles, this Court concluded that, "in light of the historical understanding of forfeiture as punishment, the clear focus on . . . the culpability of the owner and the evidence that Congress understood these provisions as serving to deter and punish", the forfeiture provisions cannot fairly be said solely to serve a remedial purpose. *Id.* at 2812. Thus, this Court held that the statutory forfeiture constituted punishment. *Id.*

The Missouri Supreme Court recognized that *Austin* applied the "solely remedial" test and conceded that under said test, an administrative suspension or revocation imposed pursuant to Mo. Rev. Stat. § 302.505 would constitute punishment. *Mayo* 915 S.W.2d at 760-61, App. A at A-5, A-6. However, it attempted to distinguish *Austin* on the grounds that it involved the Excessive Fines Clause of the Eighth Amendment rather than Double Jeopardy Clause of the Fifth Amendment, and on the fact that fines have traditionally been characterized as punishment. *Id.* at 762, App. A at A-8. These distinctions are without merit. First, "punishment" is "punishment" whether it is imposed under the Double Jeopardy Clause or the Eighth Amendment Excessive Fines Clause. *See United States v. $405,089.23*, 33 F.3d 1210, 1219 (9th Cir. 1994), *opinion amended on denial of rehearing*, 56 F.3d 41 (9th Cir. 1995), *cert. granted*, 116 S.Ct. 762 (1995) (the test for determining punishment under Excessive Fines Clause is the same as that for determining punishment under the Double Jeopardy Clause). Second, the Missouri Supreme Court has on more than one occasion characterized an administrative suspension or revocation imposed pursuant to Mo. Rev. Stat. § 302.505, at least in part, as punishment. *Mayo*, 915 S.W.2d at 762, App. A at A-9; *Vetter v. King*, 691 S.W.2d 255, 257 (Mo. banc 1985).

The analysis of whether a suspension or revocation of a driver's license pursuant to Mo. Rev. Stat. § 302.505 constitutes punishment is comparable with that applied by this Court in *Austin*, where the focus was on the statutory scheme as a whole rather than on the application of the statute to a particular individual. *Austin*, 113 S. Ct. at 2812 n.14. Under that analysis, "a civil sanction that cannot fairly be said solely to serve a remedial purpose but can only be explained as also serving either retributive or deterrent purposes, is punishment." *Id.* at 2812.

The Missouri statutory scheme, Mo. Rev. Stat. §§ 302.500–.541, focuses on the culpability and criminal history of the person who operates a motor vehicle while intoxicated. A one–year revocation is imposed in lieu of a shorter suspension if the driver has a prior alcohol related contact within the preceding five years. As conceded by the Missouri Supreme Court, an administrative suspension and revocation imposed pursuant to Mo. Rev. Stat. § 302.505 is *not* solely remedial and can only be explained in part as an effort to punish and deter those who drink and drive. *State v. Mayo*, 915 S.W.2d at 762, App. A at A-9. Although suspensions and revocations imposed pursuant to §§ 302.500–.541 also serve the remedial purpose of expeditiously removing drunk drivers from the road, that does not change the fact that such sanctions constitute "punishment" under this Court's analysis in *Halper* and *Austin*. *See Austin*, 113 S.Ct. at 2812.

CONCLUSION

The decision of the Missouri Supreme Court holding that an administrative DWI suspension or revocation imposed pursuant to Mo. Rev. Stat. § 302.505 is not punishment because the suspension serves a largely remedial purpose and cannot be characterized as only a deterrent or retributive measure, directly conflicts with this Court's decisions in *Halper* and *Austin*. Certiorari should be granted to review the decision of the Missouri Supreme Court in *Mayo* because the Missouri Supreme Court's decision disregards the proper test set out by this Court for determining when a civil sanction constitutes punishment, and in the process, erodes the important and fundamental protection against multiple punishment afforded by the Doulble Jeopardy Clause.

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